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Thirty-fourth session

Summary record of the 716th meeting

Held at the Vienna International Centre, Vienna, on Wednesday, 27 June 2001, at 2 p.m.

Chairman: Mr. Perez-Nieto Castro ....(Mexico)

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The meeting was called to order at 2.20 p.m.

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

Annex to the draft Convention (*continued*)

Section IV: Priority rules based on the time of notification of assignment (*continued*)

1. **Mr. Bazinas** (Secretariat) confirmed that the proposal made by the observer for the Republic of Korea at the previous meeting was not necessarily to reproduce article 7 *bis* in section IV. It had been made for the sake of the balance of the text: if a rule of evidence concerning the time of the conclusion of a contract was included in section III, it might be necessary to include in section IV a similar rule of evidence concerning the time of notification. It might also be preferable to state that the time at which a contract of assignment was made could be evidenced by any means, not necessarily in writing, on the assumption that for countries with rules along the lines of those in section III, the contract of assignment itself did not have to be in a writing. The situation regarding notification might be different, since even under the draft Convention, notification required a writing. Under other law, a notification had not only to be made in writing, but also formally, in an authorized document. It might therefore not be appropriate simply to indicate in section IV that the time of notification could be established by any means.

2. **Mr. Huang Feng** (China) said that his delegation wished to retain the criteria governing the priority rules set out in section IV, and requested clarification as to whether or not notification of the debtor was implied.

3. **Mr. Bazinas** (Secretariat) confirmed that notification of the debtor was implied, although no reference was made to the debtor in the definition of a notification of assignment in article 5 (d). That omission might perhaps be rectified by replacing the words "is effected", in article 8 of the annex, by "is received by the debtor".

4. **Mr. Deschamps** (Canada) noted that the form of a notification was not only a matter for States that would adopt the priority regime based on notification contained in the annex, but also for those States that would not adopt the annex, but whose national law contained a priority regime based on notification. In many instances, the notification required under national law was more formal than that provided for in the draft Convention, in which case the latter would not be sufficient to give priority to an assignee. Although the draft Convention should not seek to resolve that problem, the issue should be highlighted in the commentary in order to assist the reader.

5. **Mr. Stoufflet** (France) pointed out that the systems outlined in the annex to the draft Convention were optional. A State that had difficulty in reconciling the notification regime set out in section IV with its national notification regime could either choose not to adopt section IV and to retain its national system, or could modify its national system in the light of that section. It was a decision to be taken at the national level, not by the Commission.

6. **Mr. Bazinas** (Secretariat) said that the Secretariat would make a suggestion concerning the matter raised by the representative of Canada when the issue of form was discussed. The amendment proposed by the representative of the United Kingdom at the previous meeting, namely, to replace "is effected" in article 8 by "is received", might be expanded so as to read "is received by the debtor", in order to take account of the comment by the representative of China. For consistency, article 9 should perhaps be similarly amended.

7. **The Chairman**, noting that the concept of the amendment proposed by the United Kingdom seemed already to have been approved, requested the representative of the United Kingdom to submit her proposal to the Secretariat in writing with a view to its discussion in the drafting group.

8. *Section IV of the annex, as amended, was approved.*

9. *The annex to the draft Convention as a whole, as amended, was approved.*

Article 42 (*continued*)

10. **The Chairman** invited the Committee to resume its consideration of article 42, on application of the annex.

11. Noting that no speakers wished to take the floor, he said he took it that article 42, as amended by the United States delegation, could be approved.

12. *It was so agreed.*

13. *Draft article 42, as amended, was approved.*

14. **Mr. Burman** (United States of America) recalled that during the discussion of section II of the annex at the previous meeting the Secretariat had drawn attention to paragraph 26 of document A/CN.9/491, which suggested language covering the procedure for appointing the supervising authority and the registrar. He would have no objection to the incorporation of such language somewhere in the draft Convention, perhaps in the annex. In his delegation's view, reference should be made both to Contracting and to Signatory States, in order to ensure the widest possible participation of States.

15. **Mr. Sekolec** (Secretary of the Commission) said the inclusion of both Contracting and Signatory States would, in the Secretariat's view, present no technical difficulties.

16. **Ms. Sabo** (Canada) supported the suggestion made by the representative of the United States.

17. **Mr. Morán Bovio** (Spain) also supported the suggestion, adding that the precise wording and location of the provision could be decided by the drafting group.

18. **The Chairman** suggested that the drafting group should consider the matter further with a view to formulating the language of the provision and deciding on its precise location in the draft Convention.

19. *It was so decided.*

20. **The Chairman** invited the Commission to embark on a full review of the text of the draft Convention adopted by the Working Group, focusing in particular on the issues pending.

Title

21. **The Chairman** recalled that a suggestion had been made to delete the words "in International Trade" from the title.

22. **Mr. Morán Bovio** (Spain), supported by **Ms. McMillan** (United Kingdom), said that the words "in International Trade" should be retained, since they were a traditional formula that helped the reader to understand clearly the sphere of activity concerned. Of course, the official title of the Convention would not be used on all occasions: a shortened version would be used in ordinary practice.

23. **Ms. Sabo** (Canada) expressed satisfaction with the title, but suggested inserting the definite article before the word "Assignment"; that matter might be taken up by the drafting group.

24. **The Chairman** said he would take it that the Commission wished to retain the existing title of the Convention.

25. *It was so decided.*

26. *The title was approved.*

Preamble

27. **Mr. Morán Bovio** (Spain) said that he had no objection to the preamble as currently worded. However, it would not be appropriate to include in the preamble a clause indicating that it had built on the achievements of the UNIDROIT Convention on International Factoring as proposed in document A/CN.9/490. While the two conventions were linked, the inclusion of such a clause might create difficulties for the interpretation of the draft Convention in the light of the reference to the preamble in article 7. It would be more appropriate to include a reference in the commentary to the useful preliminary work that had been carried out.

28. **The Chairman** said that, in the absence of any objection, he would take it that the preamble to the draft Convention could be approved as currently worded.

29. *It was so decided.*

Article 1

30. *Draft article 1 was approved.*

Article 2

31. *Draft article 2 was approved.*

Article 3

32. *Draft article 3 was approved.*

Article 4

33. **The Chairman** reminded the Commission that draft article 4 was to be discussed in conjunction with draft article 41.

34. **Mr. Bazinas** (Secretariat) said that article 4, on exclusions, had been adopted by the Commission the previous year with the exception of its paragraph 4, which was linked to article 41. Like that article, paragraph 4 had been placed in square brackets. However, the Working Group had identified three issues requiring further discussion. The first was whether a negotiable instrument transferred by possession but not by negotiation should also be excluded. In order to avoid interfering with the rights of persons under negotiable instrument law, paragraph 1 (b) focused not on the type of instrument, but on the negotiation. At the last session of the Working Group the question had been raised whether documents which were transferred by delivery with an endorsement and were delivered as security to a third party should also be excluded. The rationale behind that suggestion was that the person in possession of the instrument would need to be protected in the case of a priority conflict with an assignee. The normal expectation of the person in possession would be that the law of the country where the instrument was located, rather than the law of the assignor's location, would govern such a conflict of priority. Paragraph 27 of document A/CN.9/491 contained a suggestion to exclude such possession on the assumption that the exception for negotiable instruments focused on negotiation, in order to protect the expectations of the holder of an instrument. It was assumed that where there was a receivable and also a negotiable instrument incorporating the receivable, the assignment of the receivable itself would not be excluded, but that the transfer of the negotiable instrument would be excluded by virtue of article 4, paragraph 1 (b). The text of article 4, paragraph 1 (b), did not clearly reflect that intention, and new text had been suggested in paragraph 28 of document A/CN.9/491 reading as follows: "that this Convention does not affect the rights and obligations of any person under negotiable instrument law".

35. The second issue related to the definition of securities. The Commission might wish to consider whether the reference to "investment securities" in paragraph 2 (f) was sufficient to achieve the intended goal, or whether, to take account of the text on the law applicable to dispositions of securities held with an intermediary, currently being prepared by the Hague Conference on Private International Law, that definition needed to be amended.

36. The third issue concerned the possible reformulation of article 4, paragraph 3, which had raised a number of concerns at the previous session of the Commission. In paragraph 32 of document A/CN.9/491, the Secretariat had put forward revised wording in that regard to ensure that the limitations governing the acquisition of property rights in real estate under the law of the State in which the real estate was located were not to be affected. If the concerns persisted, the Secretariat would prefer to withdraw its suggestion rather than provoke another protracted debate on the matter.

Paragraph 1 (b)

37. **Mr. Deschamps** (Canada) said that, on the issue of negotiable instruments, his delegation fully supported the new wording suggested by the Secretariat in paragraph 28 of document A/CN.9/491, which should replace the existing wording of article 4, paragraph 1 (b). A similar proposal had been made by the United States in document A/CN.9/490. He also expressed support for the suggestion made by France in document A/CN.9/490/Add.1, to replace "*effets de commerce*" with "*instruments négociables*" in the French version of the text.

38. **Ms. Piaggi de Vanossi** (Observer for Argentina), **Ms. Gavrilescu** (Romania) and **Mr. Morán Bovio** (Spain) supported the remarks of the representative of Canada concerning the Secretariat's suggested rewording of paragraph 1 (b).

39. **Mr. Ducaroir** (Observer for the European Banking Federation) said that, as he understood it, the representative of Canada had supported the new wording of paragraph 1 (b) suggested by the Secretariat, but had also supported the suggestion by France to amend two words in the French version of the existing text. It was important to be clear about what was being undertaken. At all events, great caution should be exercised in the use of terminology.

40. **Mr. Bazinas** (Secretariat) said that in view of the difficulty of arriving at a uniform definition of the term "negotiable instruments", the Commission might wish

to arrive at a general understanding of the term, which could then be further developed in the commentary.

41. **Mr. Chan** (Singapore) questioned the procedure being followed. The new wording suggested by the Secretariat referred to "negotiable instrument law". However, he doubted that such a term could safely be used when there was no agreement as to what constituted a negotiable instrument.

42. **Mr. Bazinas** (Secretariat) said that the wording suggested by the Secretariat had not created the problem; the term "negotiable instrument" already appeared in the current text of article 4, paragraph 1 (b), as approved by the Commission. The wording suggested by the Secretariat was tentative, and had merely been put forward for consideration.

43. **Mr. Zanker** (Observer for Australia) endorsed the comments made by the representative of Canada. The wording suggested by the Secretariat might perhaps be incorporated in a new paragraph 3 (c). The existing paragraph 1 (b) should then be deleted.

44. **Mr. Doyle** (Observer for Ireland) said that the language of the existing text was not particularly satisfactory and that the wording suggested by the Secretariat had initially seemed very attractive. However, he had been struck by the comments of the representative of Singapore: negotiable instrument law being a very broad and ill-defined subject, he would, on balance, prefer the text to remain as it stood.

45. **Mr. Morán Bovio** (Spain) said that the concerns expressed by the representative of Singapore and the observer for Ireland were unjustified. The wording suggested by the Secretariat, although general, clearly stated that the draft Convention would not affect the rights and obligations of any person under negotiable instrument law. However, when a transaction was not covered by negotiable instrument law, the draft Convention would be applicable. At first sight, the language suggested might appear to create difficulties. On closer examination, however, it was far preferable to the text of article 4, paragraph 1 (b), as currently worded.

46. **Mr. Bazinas** (Secretariat) said that the main issue was the two questions referred to the Commission by the Working Group: first, whether to exclude instruments transferred by possession; and second, if such instruments were not to be excluded, the need to include a different priority rule to protect the rights of persons in possession of such instruments. The Secretariat's suggestion was one way of addressing those questions.

47. **Mr. Franken** (Germany) said that while his delegation supported the comments made by the representative of Canada, it had some difficulty with the wording suggested by the Secretariat. The term "does not affect" was ambiguous, and not used elsewhere in the article. Furthermore, as was stated in paragraph 28 of document A/CN.9/491, the wording suggested by the Secretariat would also result in avoiding excluding the assignment of a contractual receivable just because the receivable was incorporated into a negotiable instrument—something which was not the intended objective. The wording to be adopted should therefore be considered further, given that most participants would agree, as a matter of policy, that something should be done to address the questions referred to the Commission by the Working Group.

48. **The Chairman** suggested that the meeting should be suspended to allow delegations to discuss their concerns directly with the Secretariat.

The meeting was suspended at 3.40 p.m. and resumed at 4.10 p.m.

49. **Mr. Bazinas** (Secretariat) said that the wording suggested in paragraph 28 of document A/CN.9/491 was one possible solution to the question put forward by the Working Group, and was consistent with the policy of the Working Group and the Commission. The intended aim was to avoid affecting the rights and obligations of persons holding instruments under negotiable instrument law. However, where, under national law, a receivable incorporated into a negotiable instrument might be assigned separately, such assignments would not be excluded from the Convention. The draft Convention would not interfere with those systems which did not permit an assignment of the receivable in the case where it was incorporated in a negotiable instrument.

50. The term "does not affect" was used in several articles of the draft Convention to imply that the matter was not excluded but that the Convention did not affect rights conferred under law other than the Convention. Thus, the priority of a person holding an instrument would be governed by the law of the country where the instrument was located.

51. The Commission had three options if it wished to address the question referred to it by the Working Group: the text suggested by the Secretariat; the inclusion in the draft Convention of a different priority rule to deal with those transfers of negotiable instruments that would not be excluded under article 4, paragraph 1 (b); and lastly, exclusion by way of declaration under article 41. The key issue was which, if any, of those three options the Commission would prefer to adopt, rather than whether or not the wording of a particular proposal was appropriate.

52. **The Chairman** suggested that, in order to expedite matters, representatives who wished to take the floor should focus on the options available.

53. **Mr. Stoufflet** (France) recalled that in the course of a series of meetings the Working Group had taken the view that it could deal with the question of negotiable instruments by excluding completely from the Convention certain types of receivables. It had then come round to the view that that would not be a sound method, and that what was significant was rather the technique used to transmit a given receivable, namely, the various forms of negotiation. France's proposal had therefore been that whenever the parties used techniques of negotiation the Convention would not apply, because such techniques were subject to an entirely different legal regime from that set out in the Convention. As he understood it, that was exactly the spirit of the text proposed by the Secretariat in paragraph 28. His delegation was therefore prepared to accept that text, the consequence of which would be that if a receivable was incorporated in a negotiable instrument and the parties transferred that receivable using the traditional forms of assignment, there was no reason why the Convention should not apply.

54. However, he had certain reservations as to the latest proposal by the Secretariat which, if he had understood correctly, would include in the Convention priority rules that would be specifically applicable in the case of negotiable instruments. He feared that that would go beyond the Commission's mandate, and might result in conflict with existing instruments.

55. **Mr. Whiteley** (United Kingdom) joined in supporting the Secretariat's argument that the Commission should seek to exclude transfer by possession. It would be better not to omit any mention of that issue in the Convention, since the debate it had so far generated showed that the question was not uncontroversial, and some guidance should be given as to how such transfers should be treated.

56. While agreeing with the representative of Germany that the provision should be drafted in clearer language, he nevertheless considered that the language in paragraph 28 was eminently preferable to the current wording. As to how the language might be improved, he concurred that it might be difficult to arrive at a definition of "negotiable instrument". The crucial point was that such instruments, whatever they were, could be and in fact were transferred easily on a daily basis outside the scope of the Convention, and that the Commission would not wish to take any step which might impede that practice.

57. **Mr. Smith** (United States of America) said that many members of the Commission appeared to be in favour of the proposal made by the Secretariat, but that others had concerns, relating chiefly to definitional issues. Perhaps the approach taken could be along the lines of that suggested by the Secretariat earlier, namely, to focus not on definitions, but rather on practical questions such as whether what was being transferred was in fact an instrument, whether the person concerned was in possession of that instrument, and if so what would be the legal effect of such possession under the law of the State in which the instrument was situated. Answering those questions would provide an answer as to what rights that person had, and whether the Convention would affect those rights.

58. If that approach was taken, the language used could be quite simple and still address all the concerns expressed. He suggested the formulation: "This Convention does not affect the rights of an assignee in possession of an instrument under the law of the State in which the instrument is situated".

59. **Mr. Franken** (Germany) said it was clear that a receivable originating under the original contract had to be distinguished from a receivable generated by issuing a cheque: it was the latter that the Commission sought to exclude from the scope of the Convention. He suggested that the sentence proposed should be amended to read: "This Convention is not applicable to the assignment of a receivable incorporated in a negotiable instrument" (or "... in an instrument governed by negotiable instrument law").

60. **Mr. Zanker** (Observer for Australia) said that although his preference was still for the Secretariat's suggested wording, he could accept the proposal by the representative of Germany if there was majority support for it.

61. **Mr. Whiteley** (United Kingdom) noted that the terms "assignment" and "assignee", used in the German and United States proposals respectively, were both defined in article 2 of the Convention. It would therefore be better to change the wording of that provision so as to make clear that the proposed exclusion concerned practices involving negotiation rather than assignment or assignees as defined in the Convention.

62. **Mr. Deschamps** (Canada) said that although the new United States proposal was not a bad one, his delegation was not prepared to endorse it, because it suspected that it differed in substance from the Secretariat's suggestion, for which it had expressed support. As had been explained by the representative of France, one of the reasons for providing for exclusions in the Convention was in order to exclude transfers by negotiation. If a transfer was effected by assignment under the rules of common law, without the assignee being able to claim any rights under the law governing negotiable instruments, then it would be in the same position as any other assignee. The United States proposal suggested that an assignee who was in possession of an instrument would not be subject to the Convention even if negotiable instrument law was not applicable.

63. The United States representative had rightly pointed out that a number of speakers had raised questions concerning the meaning of the term "negotiable instrument law", and it was true that problems of definition could not be entirely avoided. Similar problems had arisen with regard to the term "consumer protection law", and it had eventually been agreed to refer to that law only in general terms in order to avoid the Convention becoming unduly lengthy.

64. The problem of defining "negotiable instrument law" was probably less acute than the problem of defining "securities", which were referred to later in the text of article 4. The Working Group's conclusion had been that any attempt to define that term would create more problems than it solved. He submitted that difficulties over the meaning of negotiable instrument law ought not to deter the Commission from adopting the proposal of the Secretariat if it considered it to be sound in substance.

65. Nor could he support the German proposal, which, under a number of legal systems, would have the effect of removing a large number of receivables from the scope of the Convention on the grounds that they were also represented by a negotiable instrument. The moment the debtor issued a cheque in settlement of an account receivable and the beneficiary deposited that cheque in his bank, the transaction would be excluded because that deposit would constitute a transfer within the meaning of the Convention.

66. **Mr. Morán Bovio** (Spain) said the German proposal posed a serious risk of excluding from the Convention any possible assignment of a receivable incorporated in a negotiable instrument. That proposal should not be pursued, since it would run counter to the approach adopted by the Working Group over the past years.

67. The United States proposal in fact barely differed from that of the Secretariat, merely substituting the word "assignee" for the words "any person". He agreed with the United Kingdom representative that it would be preferable not to make reference to the assignee in the context of exclusions. He thus continued to prefer the Secretariat's proposal, which could perhaps be modified by the addition of the phrase "under the law of the State in which the instrument is situated", taken from the United States formulation.

68. **Mr. Bazinas** (Secretariat), on a point of clarification for the purposes of the commentary, asked whether the Commission was in a position to agree that "negotiable instrument", a term not defined in the Convention, basically meant bills of exchange, promissory notes, and cheques. It bore noting that a provision making an exclusion from the Convention need not lay down a conflict-of-laws rule, but could simply refer to the law governing the instrument.

69. **Mr. Doyle** (Observer for Ireland) said he could not support the German proposal, which was the precise opposite of what the Commission was trying to achieve. He was not opposed to the United States proposal, which was basically a refinement of the Secretariat's formulation, and could accept either proposal depending on the wish of the majority.

70. **Ms. Straganz** (Austria) said that her delegation would have favoured the German proposal, but that since the latter had not commanded much support, it could endorse the Secretariat's suggested formulation, though not the proposal made by the United States.

71. **The Chairman** noted that there was general support for the Secretariat's proposal. He suggested that it should be forwarded to the drafting group, modified so as to take into account the points raised during the discussion.

72. **Ms. McMillan** (United Kingdom) said that her delegation, while supporting the Secretariat proposal, considered that as now drafted it was too wide in scope.

73. **Mr. Bazinas** (Secretariat), in reply to questions from **Mr. Stoufflet** (France) and **Ms. Gavrilescu** (Romania), said his understanding was that the drafting group would be taking as a basis for its work the text in paragraph 28 of document A/CN.9/491, perhaps replacing the term "negotiable instrument law" by "law governing the negotiable instrument". The text would reflect points raised in the course of the discussion, and might involve a restructuring of the article as a whole.

The meeting rose at 5.05 p.m.